No. 87-1479

In The
# Supreme Court of the United States

October Term, 1987

Carlin Communications, Inc. and
Sapphire Communications, Inc.

*Petitioners,*

vs.

The Mountain States Telephone
and Telegraph Company,

*Respondent.*

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioners' prefatory paragraph in their Questions Presented incorrectly characterizes the Ninth Circuit's holding. The Ninth Circuit affirmed the district court's decision that Mountain Bell's initial termination of petitioners' 976 service was state action. The Ninth Circuit reversed the district court's determination that Mountain Bell's policy decision not to provide 976 service for sexually-oriented adult entertainment was made under color of state law. The Ninth Circuit remanded the case to the district court to reverse its injunction. The court reasoned:

> [I]n as much as the state under the facts before us may not coerce or otherwise induce Mountain Bell to deprive Carlin of its communication channel, Mountain Bell is now free to once again extend its 976 service to Carlin. Our decision substantially immunizes Mountain Bell from state pressure to do otherwise.

Pet. App. A, A-13.

This case presents only one question:

Did the Ninth Circuit correctly hold that Mountain Bell did not assume a public function in deciding not to provide 976 service for sexually-oriented adult entertainment?

## CORPORATIONS RELATED TO CORPORATE PARTIES

PARTY: The Mountain States Telephone and Telegraph Company (d/b/a Mountain Bell; d/b/a U S WEST Communications)

PARENT: U S WEST, Inc.

SUBSIDIARY OF U S WEST, Inc./PARENT OF PARTY: U S WEST Communications Group, Inc.

OTHER SUBSIDIARIES OF U S WEST Communications Group, Inc.:

U S WEST Service Link, Inc.

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

Mountain Bell, Northwestern Bell Telephone and Pacific Northwest Bell jointly own Bell Communications Research, Inc.

OTHER SUBSIDIARIES OF U S WEST, Inc., and their subsidiaries:

U S WEST Advanced Technologies, Inc.

U S WEST Capital Funding, Inc.

U S WEST Corporate Communications

U S WEST Enterprises, Inc.

U S WEST Financial Services, Inc.
U S WEST Financial Services International, Inc.

Gulf Cellular, Inc.

U S WEST Information Systems, Inc.

Applied Communications, Inc.

U S WEST International Holdings, Inc.
U S WEST International, Inc.

BetaWest Properties, Inc.

U S WEST Knowledge Engineering, Inc.

**CORPORATIONS RELATED TO CORPORATE PARTIES (Continued)**

LANDMARK Publishing Company
- Trans Western Publishing
- U S WEST Direct Company
- U S WEST Marketing Resources Company

U S WEST Business Resources, Inc.
- U S WEST Corporate Transportation, Inc.

U S WEST Network Systems, Inc.

U S WEST NewVector Group, Inc.
- U S WEST Cellular, Inc.
- NewVector Communications of Omaha, Inc.
- U S WEST Paging, Inc.
- U S WEST Cellular of California, Inc.

U S WEST Systems, Inc.

TELEMATICS INC.

U S WEST Venture Capital, Inc.

Western Range Insurance Co.

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## TABLE OF AUTHORITIES

**TABLE OF AUTHORITIES (Continued)**

## TABLE OF ABBREVIATIONS

The following abbreviations are used in this brief:

"App." (appendix to this respondent's brief in opposition)

"ER" (item from the Excerpts of Record submitted to the court of appeals)

"Pet." (petitioners' petition for writ of certiorari)

"Pet. App." (appendix to petition for writ of certiorari)

No. 87-1479

In The

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October Term, 1987

Carlin Communications, Inc. and
Sapphire Communications, Inc.

*Petitioners,*

v.

The Mountain States Telephone
and Telegraph Company,

*Respondent.*

Respondent The Mountain States Telephone and Telegraph Company ("Mountain Bell") requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## STATEMENT OF THE CASE

### A. Introduction

Petitioners' Statement of the Case is both inaccurate and misleading. Petitioners not only misstate the record, but also cite and rely on facts and events that are not a part of the record below, and which occurred several years following the facts that formed the basis for this

action. [1] For this reason, Mountain Bell submits the following separate Statement of the Case. S. Ct. R. 34.2.

Mountain Bell is a regional telephone company that provides intrastate telephone service in seven of the western states. [2] This dispute involves only its provision of "976 service" within the State of Arizona.

The Mountain Bell "Scoopline" or "976 service" involved in this case permits subscribers such as petitioners to disseminate prerecorded messages to callers who dial an assigned "976" prefix number. App., p. A-3, ¶ 9. Time and temperature, sports, and horoscope information are typical messages available through 976 service. *Id.*

These messages also could be disseminated to callers over regular business lines. *See* App., p. A-5, ¶ 13. The significant difference between 976 service and regular business service is that Mountain Bell provides billing and collection services *for 976 subscribers only.* 976 service permits subscribers (i.e., petitioners) to set the fee charged to those who call their numbers. Mountain Bell, *as part of the 976 service,* identifies and bills those callers, collects the billed fees, and remits them to its 976 sub-

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[1] For example, petitioners repeatedly allude to an order to show cause *currently* pending before the Arizona Corporation Commission. *E.g.*, Pet. at 4-5, 9, 12, 14-15. Petitioners improperly include, as Appendices E and F to their petition, documents related to the order to show cause. The order to show cause was not issued until December 1987, and, moreover, is unrelated to the dispute at bar between petitioners and Mountain Bell. Contrary to petitioners' insinuation, the order to show cause was not (and could not have been) a factor in Mountain Bell's decision to terminate petitioners' 976 services in 1985. In addition, as the record in the order to show cause proceeding demonstrates, Mountain Bell disputes the Commission's power to alter or amend the terms and conditions under which 976 services are offered, or to require Mountain Bell to discontinue or restrict access to 976 services.

[2] Those states are Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming.

scribers. App., p. A-4, ¶ 11. *It is this inexpensive identification, billing and collection service that makes 976 service so attractive to petitioners.* The direct billing from Mountain Bell is also the feature that causes customers to identify Mountain Bell with the messages offered.

Petitioners suggest that denial of 976 service precludes them from engaging in their "electronic publishing" activities. This is not correct. The high volume "electronic publishing" capabilities to which petitioners allude, *see* Pet. at 3, resulted from the characteristics of the equipment that *petitioners* provided and attached to Mountain Bell's telephone lines. *See* ER 51, ¶ 35; ER 86, p. 14, l. 26 - p. 16, ll. 1-3. Nothing about the 976 lines, as opposed to regular business telephone lines, precludes petitioners from connecting their equipment to regular business lines and handling the same number of calls they claim they could handle over 976 lines. *See* App., p. A-5, ¶ 13. If they used business lines to disseminate their messages, however, *petitioners* would have to identify the callers and perform their own billing and collection functions.

Petitioners are complaining about two distinct courses of conduct. Throughout the proceedings, these courses have been referred to as "phase one" and "phase two." Phase one relates to a federal district court judge's determination that petitioners' messages were obscene under all standards, to his order directing Mountain Bell to terminate petitioners' 976 service, and to Mountain Bell's termination of that service on May 29, 1985. Phase two relates to Mountain Bell's decision to examine whether it should continue to associate with sexually-related adult entertainment, Pet. App. J, p. A-65, ¶ 5, and to its decision to refuse 976 service for dissemination of messages containing sexually-explicit material.

B. **Phase One**

Petitioners began transmitting messages over 976 in late March 1985. Almost immediately, customers barraged Mountain Bell with complaints because of the sex-

ual content of the messages and because children had access to the messages and were dialing petitioners' 976 numbers without parental approval. Pet. App. J, p. A-64, ¶ 2. Newspaper articles and editorials criticized Mountain Bell for billing for and "profiting" from such services. Pet. App. J, p. A-62, ¶ 2. In addition, some legislators and school officials expressed concern over Mountain Bell's "association" with dial-a-porn services. Pet. App. J, p. A-62, ¶ 3. In response to these negative reactions, Mountain Bell began an internal investigation of the messages being disseminated by petitioners. ER 81, Ex. DD, ¶ 5.

In May 1985, a deputy county attorney notified Mountain Bell that petitioners' messages violated Ariz. Rev. Stat. § 13-3506,[3] that they were being distributed to minors, and that the county attorney's office intended to prosecute petitioners and possibly Mountain Bell. Mountain Bell took two actions in response to the county attorney's notice. First, it notified the subscribers whose 976 numbers were listed by the assistant county attorney that their services would be terminated on May 29, 1985, pursuant to Part 2.2.9(A)(7) of its ENS Tariff.[4] Pet. Apps. G and H. Second, Mountain Bell filed a declaratory judgment action in the United States District Court, District of Arizona, seeking a determination of its rights and obligations under state and federal law. *The Mountain States Telephone and Telegraph Company v. Save Enterprises, et al.*, Cause No. 85-1329 PHX-PGR. Pet. App. I at p. A-62.

Judge William P. Copple held an expedited hearing and reviewed recordings and transcripts of messages trans-

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[3] The version of the statute in effect in May 1985 is reproduced at Pet. App. C, p. A-24. The statute has since been amended. *See* Ariz. Rev. Stat. § 13-3506 (West Supp. 1987). See also discussion *infra* at n.10.

[4] Mountain Bell's tariffs are filed with the Arizona Corporation Commission. Part 2.2.9(A)(7) of the ENS tariff is reproduced in Pet. App. C, pp. A-25-26.

mitted by petitioners and other defendants. Judge Copple ordered Mountain Bell to suspend and terminate petitioners' and others' 976 services. ER 115, Ex. R. Judge Copple found the telephone messages to be obscene and harmful and available to minors. ER 81, Ex. EE, p. 2. He also found that they appealed to prurient interests, were patently offensive, had no serious literary, artistic, political or scientific value, and, therefore, were not protected speech under the First Amendment. *Id.* Pursuant to Judge Copple's order, Mountain Bell terminated petitioners' 976 services on May 29, 1985. [5]

C. **Phase Two.**

On May 31, 1985, Mountain Bell corporate officers met to determine whether the Company should continue to be associated with sexually-related adult entertainment. Pet. App. J, p. A-65, ¶ 5. Among the factors weighed in their determination were Judge Copple's order, the adverse public reaction to Mountain Bell's role in billing for and "profiting" from these services, and the content of the messages that had been disseminated. The officers concluded that Mountain Bell's corporate image and reputation were being irreparably damaged by the association of "dial-a-porn" with Mountain Bell. For this reason, they decided that Mountain Bell would disassociate its 976 service from sexually-oriented adult entertainment. *Id.*

To implement this policy, Mountain Bell made a corporate decision not to provide 976 service for the dissemination of adult entertainment messages that included sexual comment or content, or foul or profane language. This prohibition applied whether or not proposed messages were sufficiently explicit to violate local obscenity statutes. It also applied to all states in which

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[5] Mountain Bell terminated petitioners' 976 service in compliance with the district court's order, *not* (as petitioners' claim and the Ninth Circuit assumed) because the county attorney had notified Mountain Bell that it might be subject to criminal prosecution.

Mountain Bell operated, not just Arizona. On June 3, 1985, Mountain Bell publicly announced that it would not provide 976 service for "adult entertainment messages with sexually-oriented content," ER 115, Ex. S, and voluntarily dismissed Cause No. 85-1329 PHX-PGR.

On June 4, 1985, Mountain Bell notified petitioners that their 976 service had been disconnected pursuant to court order after a finding that their messages were legally obscene. ER 81, Exs. GG and HH. In addition, Mountain Bell informed petitioners that 976 service would no longer be available for transmission of "adult entertainment which includes any sexual content." *Id.*

After Mountain Bell terminated petitioners' 976 service, petitioners filed the present action. The district court found that Mountain Bell's termination of petitioners' 976 service was illegal and issued an injunction requiring Mountain Bell to restore the service. Pet. App. B.

Mountain Bell appealed to the Ninth Circuit which held, as a matter of law, that (i) Mountain Bell's content-related policy was not unlawfully discriminatory;[6] (ii) no requirement compelling Mountain Bell to carry salacious or pornographic messages could be inferred from state public utility law;[7] (iii) Mountain Bell's initial termination of petitioners' 976 service was state action; and (iv) Mountain Bell did not assume a public function in deciding not to provide 976 service for sexually-oriented adult entertainment. Pet. App. A, p. A-11. The court concluded that, because the criminal statute under which the county attorney's office had threatened to prosecute Mountain Bell was unconstitutional, injunctive relief was unavailable because Mountain Bell could not under color of that statute be coerced to refuse 976 service to petitioners. The Ninth Circuit

[6] Petitioners do not seek review of this ruling.

[7] Petitioners do not seek review of this ruling.

reversed and remanded the case to the district court to vacate the injunction. Petitioners now ask this Court to grant a writ of certiorari to address whether Mountain Bell's refusal to provide 976 service to petitioners is actionable under 42 U.S.C. § 1983 because Mountain Bell's new policy is "tainted" by state action.

## REASONS FOR DENYING THE PETITION

No special and important reasons justify the Court's review of this case on writ of certiorari. First, the court of appeals' decision does not conflict with any other federal court of appeals' decision on the same matter. Second, the decision does not involve an important federal question that has not been settled by this Court. Third, the court of appeals did not decide a federal question in a way that conflicts with applicable decisions of this Court. S. Ct. R. 17.1(a),(c). Indeed, its decision is wholly consistent with established principles of federal law that have been fully explicated by this Court.

### A. No conflict exists among the circuits.

The Ninth Circuit's decision is consistent with the Eleventh Circuit's decision in *Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986). There, Southern Bell's refusal, based on the content of the messages, to provide "Dial-It" service to Carlin was held not to be state action. Southern Bell had acted in accordance with its tariff, which excluded from Dial-It illegal messages and any message that "implicitly or explicitly invites, describes, stimulates, excites, arouses, or otherwise refers to sexual conduct, or which contains sexual innuendo which arouses or attempts to arouse sexual desire." 802 F.2d at 1355. The court concluded that the operative decisions (including the exclusionary language in the tariff and the company's refusal to activate Carlin's Dial-It service) were made by Southern Bell and not the state public utility commission. *Id.* at 1361. The court held that Southern Bell's action was not fairly attributable to the state. *Id.* at 1362.

The Ninth Circuit's decision is also consistent with *Occhino v. Northwestern Bell Tel. Co.*, 675 F.2d 220 (8th Cir.), *cert. denied*, 457 U.S. 1139 (1982), and *Kadlec v. Illinois Bell Tel. Co.*, 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969). These cases hold that a regulated telephone company that terminates a customer's service, in the course of enforcing its own rules and regulations, does not act under color of state law.

Petitioners attempt to create a conflict among the circuits by arguing that the Ninth Circuit's holding that petitioners are not entitled to injunctive relief is inconsistent with the application of section 1983 in other circuits. No case cited by petitioners holds that injunctive relief is required in circumstances similar to this case.

In this case, the Ninth Circuit reversed the trial court on the issue of whether Mountain Bell's policy not to provide 976 service for sexually-oriented adult entertainment (phase two of the case) was state action. The district court's injunction was based on its dual finding of state action with regard to both phases of the case: the original termination (phase one) and Mountain Bell's subsequent policy decision (phase two). The Ninth Circuit concluded that injunctive relief was not required. [8]

Petitioners rely on three cases in their conflict-among-the-circuits argument. None of these cases supports their position. *NAACP v. City of Evergreen, Alabama*, 693 F.2d 1367 (11th Cir. 1983), involved the need for injunctive relief in the context of past racial discrimination in employment practices by a governmental entity, the City of Evergreen. An injunction was found to be appropriate to prevent future illegal employment practices by the city. 693 F.2d 1370-71. *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1985), was not a section 1983 action. There an employee sued his employer and the

[8] The court did not, as petitioners suggest, address the propriety of the original injunction.

United States for disseminating a letter of reprimand charging that he mischaracterized personal research as work done for his employer. The court held that the plaintiff had stated a cause of action under *Bivens*, which the court found extended to individuals acting under color of federal law. The court remanded for trial on the merits and stated that the trial court could grant injunctive relief if appropriate. 750 F.2d at 1061-62. The court did not hold that an injunction was required. *Miller v. Fairchild, Inc.*, 797 F.2d 727 (9th Cir. 1986), was an employment discrimination case in which the Ninth Circuit noted in *dictum* that "[a] plaintiff with a cause of action under section 1981 is entitled to equitable and legal relief . . . ." 797 F.2d at 733.

None of these decisions is remotely inconsistent with the Ninth Circuit's decision in this action.

**B. This case does not involve an important federal question that has not been addressed by this Court.**

**1. No novel federal question exists regarding state action.**

The principles of state action have been discussed and defined by this Court on numerous occasions. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, ___ U.S. ___, 107 S. Ct. 2971 (1987); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). And, contrary to petitioners' suggestion, there exists no gap or need for reconciliation of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), with *Marsh v. Alabama*, 326 U.S. 501 (1946), *Evans v. Newton*, 382 U.S. 296 (1966), and *Terry v. Adams*, 345 U.S. 461 (1953). This Court undertook that task in *Flagg Brothers*. What emerged from *Flagg Brothers*, and remains the rule today, is the principle that an action will be found to be "governmental" when a private entity performs a function that has been "traditionally the *exclusive* privilege" of government. *See San Francisco Arts & Athletics, Inc.*, ___ U.S. at ___, 107

S. Ct. at 2985 (emphasis in original), and cases cited therein.

The Ninth Circuit applied precisely that test to the facts here. Petitioners seek nothing more than this Court's review of the Ninth Circuit's application of that established legal principle to the unique facts of this case. That does not merit this Court's review.

**2. No novel question has been raised regarding remedies available under section 1983.**

Petitioners claim that this case presents "a substantial question of statutory interpretation concerning the availability of injunctive remedies" under section 1983. Pet. at 11. This claim is neither made nor fairly included in any of petitioners' "questions presented," nor do petitioners discuss it (other than asserting it) in their argument. Consequently, the claim should not be considered. S. Ct. R. 21.1(a). Moreover, the challenged decision does not question or ignore established tests for determining whether injunctive relief should be granted. The fact that petitioners are displeased with the Ninth Circuit's application of established principles to this action does not call for this Court's attention.

**C. The Ninth Circuit's decision does not conflict with applicable decisions of this Court.**

Again, petitioners attack the Ninth Circuit's decision because they disagree with the way the court applied established legal principles to the peculiar facts of this case. Petitioners do not challenge the principles applied by the court, which may be summarized as follows: The fact that a business is subject to extensive and detailed state regulation does not by itself convert an action of that business to state action. *Jackson*, 419 U.S. at 350. Further, the fact " '[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action.' " *San Francisco Arts & Athletics, Inc.*, ___ U.S. at ___, 107 S. Ct. at 2985 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)). And, "[m]ere

approval of or acquiescence in the [private] initiatives" by the government is not enough to make the private entity's actions state action. *Id. See Flagg Brothers*, 436 U.S. at 164-65. The Ninth Circuit's holding that, as a matter of law, Mountain Bell did not assume a public function in deciding not to provide 976 service for sexually-oriented adult entertainment is wholly consistent with these principles.

Petitioners primarily rely on three "facts" to support their state action argument. First, they contend that Mountain Bell's decision, in phase two of the case, was tainted by the assistant county attorney's threat of prosecution in phase one of the case.[9] Pet. at 14. This argument is moot. The Ninth Circuit affirmed the district court's ruling that the criminal statute that supported the threat of prosecution was unconstitutional. Under this ruling, Mountain Bell is free to decide whether, under its corporate policy, it wishes to extend 976 service to petitioners.[10]

Second, petitioners suggest that Mountain Bell acted out of fear that the Arizona Corporation Commission might react adversely to the company's association with dial-a-porn. Pet. at 14-15. As discussed at note 1, above, this suggestion is based on a proceeding currently before the Arizona Corporation Commission. No fact existed at the time this dispute arose that would have suggested to either party that the Commission was threatening to

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[9] *See, supra*, note 5.

[10] The unconstitutional statute (Ariz. Rev. Stat. § 13-3506, as amended 1978 Ariz. Sess. Laws, Ch. 201, § 219) no longer even exists. It was substantially amended by Arizona's legislature in 1986. Among other things, the amendments changed the definition of "items" that are harmful to minors and modified the nature of the conduct proscribed by the statute. *See* 1986 Ariz. Sess. Laws, Ch. 411, §§ 1, 3, codified as Ariz. Rev. Stat. § 13-3506 (West. Supp. 1987). Thus, there is no danger that the statute relied on by the county attorney again will be used to attempt to coerce Mountain Bell's conduct.

withdraw Mountain Bell's franchise if it did not censor petitioners' speech. *See* Pet. at 14-15. [11]

Third, petitioners suggest that Mountain Bell assumed a government censorship function because it responded to complaints by the public, its customers. Pet. at 14-15. Mountain Bell's decision not to provide 976 service for sexually-oriented adult entertainment was not, as petitioners claim, a "public function." Censorship is not a function traditionally reserved exclusively to the government. Indeed, the First Amendment prohibits the government from regulating speech. [12] Mountain Bell's decision in this case is precisely the type of business decision permitted to a private enterprise.

Mountain Bell's freedom to refuse to provide 976 service (which includes billing and collection) to dial-a-porn businesses does not, as petitioners prophesy, raise "the spectre of private, government-sanctioned censorship over the dominant channels of communication for the future." [13] Petitioners can still disseminate their messages over Mountain Bell business telephone lines. Peti-

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[11] In fact, no such threat has been made, nor could it be under Arizona law. *See James P. Paul Water Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983).

[12] Regulation is permitted only if it is narrowly tailored to further a significant government interest, such as the protection of minors. For example, the Second Circuit has held that the FCC may regulate the provision of petitioners' information services under 47 U.S.C. § 223(b), which provides criminal sanctions for providing obscene interstate or international telecommunications messages to minors. *Carlin Communications, Inc. v. Federal Communications Commission*, 837 F.2d 546 (2d Cir. 1988) (upholding regulations issued pursuant to 47 U.S.C. § 223(b); invalidating application of § 223(b) to indecent, but not obscene, speech).

[13] Petitioners' description of telecommunications advances in France and predictions of future technological applications, *see* Pet. at 28-29, while certainly interesting, does not rely upon the record and has nothing to do with the issues decided by the Ninth Circuit in this case.

tioners' use of business lines would not, however, require Mountain Bell to act as their billing and collection agent.

The Ninth Circuit correctly applied the principles of *Jackson* and its progeny to hold that state action did not inhere in Mountain Bell's decision to adopt a policy not to provide 976 service for sexually-oriented adult entertainment.

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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April 6, 1988

# APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

| | |
|---|---|
| CARLIN COMMUNICATIONS, etc., et al.,<br>Plaintiffs,<br>v.<br>THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, etc., et al.,<br>Defendants. | No. CIV 85-1420 PHX CLH<br>AFFIDAVIT OF AMY SCHMELZEL |

STATE OF ARIZONA }
County of Maricopa } ss.

AMY SCHMELZEL, being first duly sworn, upon her oath, deposes and states as follows:

1. I am an employee of The Mountain States Telephone and Telegraph Company ("Mountain Bell") in Phoenix, Arizona.

2. As such I am the Account manager for Phoenix LATA ScoopLine services and am responsible for the sales, implementation and maintenance of all such services in the Phoenix LATA. My job functions include providing information to ScoopLine service subscribers regarding such things as rates, geographic areas with access to the 976 numbers, and conditions of service; gathering information necessary to process and install the subscribers' requests for service; and coordinating interdepartmental activity to install requested services, and to service their accounts on an ongoing basis.

3. I am personally familiar with 976 network services as offered in the Phoenix, Arizona LATA (Local Access Transport Area), as well as the terms used to describe different categories of telephone transmission, such as interLATA services, intraLATA services, and local access transport area. I am also personally familiar with ScoopLine Services and local exchange services provided by Mountain Bell to Carlin and Sapphire communications companies as they specifically relate to the operation of their 976 adult entertainment services in the Phoenix LATA.

4. The term LATA or Local Access Transport Area is a term which was coined as a result of the breakup of the Bell system by consent of the parties. The consent decree divided the country into many different LATAs. Colorado and Arizona, for example, are divided into two LATAs each. Mountain Bell handles all calls within each of its

LATAs. Other long distance carriers handle calls between LATAs and calls between states. I have attached and incorporate by reference maps of Arizona and Colorado delineating the LATA configuration in those respective states.

5. The term "intraLATA" refers to calls made within the exterior boundaries of a LATA. The term "inter-LATA" refers to calls made between locations located in different LATAs. The term "intrastate" refers to calls made between locations in the same state, and the term "interstate" refers to calls made between locations in different states. Telephone traffic between LATAs may also be denoted as interLATA and intrastate or inter-LATA and interstate.

6. On approximately December 16, 1984, Mountain Bell introduced a competitive service in Arizona using the trade name "ScoopLine." A tariff relating to ScoopLine service was filed with the Arizona Corporation Commission, a true and correct copy of which is attached hereto as Exhibit "A."

7. The tariff was filed under Mountain Bell Competitive Tariff 100 Series.

8. Competition to Mountain Bell's 976 ScoopLine service currently exists in that comparable information may be obtained by any caller by dialing over AT&T telephone lines (or the lines of any other interexchange carrier), and by accessing into the Pacific Bell System and the NYNEX System. In addition, AT&T, a competitor of Mountain Bell, has the capacity of offering comparable service over its 900 series numbers.

9. ScoopLine is an information service offering in which Mountain Bell provides the transport to connect an information-provider (the "subscriber") with a Mountain Bell end-user (the "caller"). Typical information services include time and temperature, sports information, and horoscopes.

10. The Arizona Corporation Commission regulates rates and 976 service to the extent that it requires the company to charge a minimum rate to cover its costs, in order to insure that subsidies do not flow from monopoly provided services to competitively provided services.

11. Mountain Bell charges ScoopLine subscribers an initial establishment fee of $1,800. In addition, subscribers must pay $23.30 per line per month plus $40 per month per telephone number. Mountain Bell also charges ScoopLine subscribers 15¢ for the first minute of each call, and 5¢ per minute for every minute thereafter. Each ScoopLine subscriber determines the amount of the fee which will be billed to the callers. The fee can be fixed on a per call basis, or measured on the basis of the duration of each telephone call. Mountain Bell then collects the fees charged to callers, deducts the amounts owed by the subscriber to it, and remits the balance to the subscriber on a monthly basis.

12. Carlin and Sapphire have subscribed to remote call forwarding services. This allows them to dial from New York to a Phoenix telephone number which then forwards their call to their Phoenix 976 service. This allows them to monitor the transmission quality of their Phoenix 976 services. These numbers are non-published numbers that Mountain Bell does not disclose to anyone requesting the number, so they should only be available to Carlin and Sapphire. Each remote call forwarding service that they have subscribed to allows for only one call at a time to be forwarded to the 976 service. For all practical purposes, it is not set up to provide nationwide access to their Phoenix ScoopLine services. The other type of call forwarding available would allow anyone in Phoenix with that feature to forward their phones to 976 numbers. Anyone calling such a telephone number would find automatically that instead of reaching the person dialed, a connection would be made with the 976 number and the associated message. In either case, the customer subscribing to the call forwarding service itself is actually

billed the 976 charge. Due to the fact that the call forwarding customer is charged for the 976 call, as a practical matter that discourages them from using a call forwarding service in order to provide nationwide, or even local, access to the 976 number.

13. The access lines Carlin and Sapphire subscribe to are normal business lines connected to the 976 network. The same lines could be used by any other type of customer to provide other types of business services. For example, Carlin and Sapphire subscribe to a total of eighty-eight ScoopLine service lines. These lines could be re-used tomorrow by a law firm for their regular business service.

14. The telephone facilities that are used to provide the messages to Phoenix area callers are separate from the facilities used to receive the messages from the New York location. Carlin has a Phoenix telephone number supplied by Mountain Bell that is in turn connected to long distance lines, to transmit messages from their New York system to their Phoenix machine and to test the machine. They also have a remote call forwarding number which is used to monitor transmissions.

15. The ScoopLine service over which plaintiffs Carlin and Sapphire previously broadcast messages is only accessible in the northern Arizona "LATA" (Local Access Transport Area). LATA is a term which defines the geographic area within which a Bell operating company such as Mountain Bell may carry traffic. By the terms of the modified final judgment (MFJ) or consent decree, Mountain Bell and other operating companies are prohibited from carrying interLATA traffic, that is traffic between LATAs within a particular state or traffic between states. 976 messages originating in the Phoenix LATA cannot be accessed by anyone calling from outside of the State of Arizona or even from southern Arizona. The service involves only intraLATA communications, except in those rare instances where either the company's equipment

failed to block a call from outside of the Phoenix LATA or where a PBX system or call forwarding service was used to access the local 976 number through interLATA channels. In those rare instances where interLATA access has been gained through operator assisted calls, the company has revised its software to prevent a reoccurance in the future.

16. Each telephone company has the authority to assign its own "976" numbers to its own subscribers, independently of the assignment of 976 numbers to subscribers by other telephone companies.

17. Those subscribers may use the same 976 numbers to provide various types of information independently of the type of information offered over that "976" number in other LATAs, states, or telephone companies.

18. For example, a number may be used by a subscriber to offer sports information in the northern Arizona LATA, the same or different subscriber may use that same number to offer horoscope information to callers in the Denver LATA, and one of those same subscribers, or a different one, may use that same number to offer financial information in the Atlanta area.

19. In some cases, a 976 number may be used by a single subscriber to offer the same type of information in more than one LATA, state, or telephone company. This is accomplished by the provider negotiating with each operating company for the use of the number within that company's territory, and is dependent on that number not already being used by another subscriber.

20. Beginning in approximately March, 1985, at the request of five separate corporate entities, Mountain Bell put into service in Arizona five separate telephone numbers under the ScoopLine series of numbers (976-____). These ScoopLine service numbers were applied for on the basis that they would be used for "adult entertainment" purposes.

21. Mountain Bell, acting as a private business entity, is not required by contract, by tariff, or by statute, to act as a collection agent for ScoopLine service subscribers.

22. Statements reflecting payments made by Mountain Bell to Carlin Communications, Inc. in the amount of $3,678.05 for the period commencing March 28, 1985 through June 7, 1985, are attached as Exhibit "B" hereto. Likewise, statements reflecting payments by Mountain Bell to Sapphire Communications in the amount of $11,619.85 for the period March 28, 1985 through June 7, 1985, are attached as Exhibit "C" hereto.

23. On July 11, 1985, I attempted to dial direct to 1-303-976-3636. On July 10, 1985, I attempted to dial 0-303-976-3636 by credit card or operator assistance. I could not reach the sponsor's recorded announcement. In each case, I reached an AT&T recorded announcement that said:

> We are sorry, your call cannot be completed as dialed. Please check the number and dial again, or call your operator to help you.

24. On July 17, 1985, I placed telephone calls to the following numbers: 1-213-976-2727, 1-213-976-6969 and 1-212-976-2727. Each telephone number put me in contact with a tape recorded message comparable and similar to the messages recorded by Mountain Bell over its Arizona ScoopLine system for the numbers 976-2727 and 976-6969, transcripts of which are attached to Tim Fyke's affidavit.

25. On July 12, 1985, I made a comparison between charges for 976 adult entertainment calls made within the Phoenix LATA and 976 adult entertainment calls made by way of interstate carrier. Listed below are long distance carrier charges for calls from Area Code 602-998 to Area Code 212-976, as obtained from sales representatives of each carrier. All rates are very new; companies' brochures have not been updated to reflect price change:

| | AT&T* | MCI* | Sprint* |
|---|---|---|---|
| Daytime (8am-5pm-weekdays) | 65¢/42¢ | 52¢/40¢ | 60¢/38¢ |
| Evening (5pm-11pm-weekdays) | 39¢/25¢ | 32¢/23¢ | 33¢/22¢ |
| Nites and Weekends (11 pm-8am-weekdays, Saturdays, Sunday, holidays) | 26¢/17¢ | 20¢/15¢ | 23¢/15¢ |

A call by a Phoenix metro area caller to 1-976-2727 will cost 50¢. A Phoenix metro area caller may dial 1-212-976-2727, and pay less than 50¢ in toll charges, if calling during the evening, night, or weekend.

A Phoenix metro area caller may call 1-976-6969 for a $2.00 charge. A Phoenix metro area caller may dial 1-212-976-6969, and pay less than $2.00 in toll charges, during any time of day or night.

26. Mountain Bell customer account records show that 976 network services for Carlin and its associated entities were installed on the following dates in Phoenix, Arizona:

1-979-6969 — March 28, 1985
1-976-2727 — March 28, 1985

27. There are local lines interconnected with long distance lines for purposes of carrying 976 messages from New York to Phoenix. IntraLATA lines only are used to transmit the local message to the intraLATA callers.

*first minute/each additional minute

28. Further affiant sayeth not.

/s/ AMY SCHMELZEL
Amy Schmelzel

SWORN AND SUBSCRIBED to before me this 17th day of July, 1985.

/s/ ALLISON MURPHY
Notary Public

My Commission Expires:
Nov. 23, 1988

EXHIBITS to Amy Schmelzel's Affidavit have been omitted.